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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-553

DOMINIC S. RINALDI,

Petitioner,

—v.—

HOLT, RINEHART & WINSTON, INC. and
JACK NEWFIELD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Petitioner prays that a writ of certiorari issue to the Court of Appeals of the State of New York to review a judgment of that Court entered on July 14, 1977. A motion for rehearing was denied by that Court on September 7, 1977.

Opinions Below

The majority, concurring and dissenting opinions of the Court of Appeals reversing the decision of the Appellate Division and granting summary judgment to the respondents are set forth in separate Appendix C, A5. They are reported in 42 N.Y. 2d 369.

The majority, concurring and dissenting opinions of the Appellate Division affirming the denial of summary judgment are set forth in Appendix D, A55. They are reported in 53 A.D.2d 839, 386 N.Y.S.2d 818.

The unreported opinion of the Court of first instance denying summary judgment is set forth in Appendix E, A66.

Jurisdiction

The final judgment of the Court of Appeals of the State of New York, the highest state court, was entered on July 14, 1977 (Appendix A, A1). A timely motion for a rehearing was denied by that Court on September 7, 1977 (Appendix B, A3).

The judgment of the Court of Appeals dismissing the libel action of the petitioner is based on the respondents' free press rights under the First Amendment to the Federal Constitution. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). (*Zacchini* v. *Scripps Howard Broadcasting Co.*, —— U.S. —— 53 L. Ed.2d 965 (1977).

Constitutional Provisions Involved

United States Constitution, Amendment I

"Congress shall make no law . . . abridging the freedom of speech or of the press."

United States Constitution, Amendment XIV, Section 1:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Questions Presented

1. Did the petitioner, a public official, meet the burden imposed on him by the decisions of this Court in *New York Times* v. *Sullivan*, 376 U.S. 254 (1964) and its progeny of showing falsity and malice on the part of the respondents sufficient to defeat their motions for summary judgment?

2. Where the published charge that petitioner is "probably corrupt" is admitted by respondents to be based totally on an indictment of petitioner for perjury and petitioner has shown the falsity of such charge, did the Court below correctly interpret the decisions of this Court in *New York Times* v. *Sullivan, supra,* and its progeny as requiring it to hold that the petitioner nevertheless has the burden of proving as a general negative that he is not "probably corrupt?"

3. Where the published charge of "suspiciously lenient sentences" is admitted by respondents to be based on four specific cases and petitioner has shown by the Court records in those four cases that the charge based thereon is false, did the Court below correctly interpret the decisions of this Court in *New York Times* v. *Sullivan, supra,* and its progeny, as requiring it to hold that the petitioner nevertheless has the burden of proving as a general negative that "no sentences were unduly lenient?"

4. Where the respondents admittedly based their charge that petitioner was "suspiciously and inexplicably lenient to heroin dealers and organized crime figures" and "is putting people (Glover) on the street who sell death for a profit" on four specific cases and respondents knew from the Court records in those four cases and knowingly and purposefully omitted from their publication that the dis-

positions by petitioner in each of those four cases was upon the consent and recommendation of the district attorney and that Glover was in jail for five years and was not put on the street, did the Court below correctly interpret the decision of this Court in *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), as requiring it to hold that the choice of material to go into the book was an exercise of editorial judgment on the part of the respondents and thus that the knowing omissions did not evidence malice on the part of the respondents?

5. Was it a reckless disregard for truth or falsity for respondents in their publication to charge that petitioner is "very tough on long-haired attorneys and black defendants especially on questions of bail, probation and sentencing" and that "every law enforcement agency in the state is aware of Judge Dominic Rinaldi's reputation for going easy on members of the Mafia. The Joint Legislative Committee on Crime has a whole file full of suspicious dispositions by Rinaldi in organized crime cases" and on their motions for summary judgment to have offered nothing to support such charges, thus indicating that such charges were made without supporting basis?

6. Was it malice on the part of the respondents to have put a heading in large type "Justice Gets A Fix" on one of the articles about petitioner republished in their book, thus creating the anticipation and impression in the minds of its readers that it would show venality or corruption on the part of the petitioner in his dispositions of the cases discussed therein, when in fact there was no claim of venality or corruption anywhere in the text of the article, and the author admitted on pre-trial disclosure that nowhere in the article did he charge venality or corruption and that he had no evidence of corruption?

Statement

The petitioner is a justice of the Supreme Court of the State of New York. The respondent Jack Newfield (Newfield) is an editor of a weekly newspaper called the Village Voice (Voice). Newfield wrote four defamatory articles in Voice about the petitioner in the issues of August 31, 1972 (Appendix H, A120), October 12, 1972 (Appendix H, A127), November 9, 1972 (Appendix H, A130) and November 30, 1972 (Appendix H, A132), and an article in New York Magazine of October 16, 1972 (Appendix H, A134).

Petitioner did not commence any action on these articles for the very pragmatic reason that under the constraint imposed by *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), he then was not possessed of proof which would probably sustain a finding of malice in the publication of the false articles.

After the first four of those articles were published, the Brooklyn Bar Association made an investigation of the cases on which Newfield based his charges against the petitioner in those articles and found the charges to be false and unfounded (Appendix Y, A195). By letters dated November 28, 1972 (Appendices S, T, A182, 183) the Brooklyn Bar Association advised Voice and New York Magazine of the "results of the investigation which discloses that the facts reported by the author are inaccurate, incomplete and in many cases totally incorrect."

The Association of the Bar of the City of New York also made an investigation of the charges made by Newfield against petitioner in the New York Magazine article of October 16, 1972 that "his judicial temper softens remarkably before heroin dealers and organized crime figures," which allegations were stated to be based on the disposi-

tions by petitioner in three named cases, *People* v. *Burton*, *People* v. *Glover* and *People* v. *Vario* (Appendix H, A134). The Association of the Bar Committee obtained transcripts of the court minutes in those three cases. It then, on December 28, 1972, interviewed Newfield about those three cases (Appendix X, A190, Appendix DD, A251). Its Report, based on the facts in those three cases, which it set forth, and the interview with Newfield, concluded that "Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts" (Appendix X, A194).

On October 12, 1972, a Legal Aid Attorney named Joseph Vincent Morello wrote a letter to New York Magazine advising it that the court records in the *Burton* case show that Newfield's statements about that case, more elaborately stated in Newfield's Voice article of August 31, 1972 were erroneous in the respects pointed out in his letter (Appendix U, A184). Newfield admitted that New York Magazine forwarded Mr. Morellos' letter to him (Appendix CC, A232).

Thereafter, on February 25, 1973, Voice published an advertisement in the New York Times (Appendix H, A118) in which it referred to the articles by Newfield and republished some of the charges made in those articles against the petitioner.

Petitioner then commenced an action against Voice and its advertising agency on the advertisement (Appendix H, A114). In that action, petitioner claimed that the false commercial advertisement did not have First Amendment protection and that, in any event, the republication therein of the charges in the articles after receipt of the letters from the Brooklyn Bar Association and Mr. Morello and Newfield's interview by the Association of the Bar on December 28, 1972 was sufficient proof of malice to deny to the

republication any First Amendment protection. The complaint in that action alleged that the statements in the original articles, on which the advertisement was based, were false and attached and made the articles a part of the complaint (Appendix H, A115).

The defendants in that action moved for summary judgment which was denied (*Rinaldi* v. *Village Voice Inc.*, 79 Misc. 2d 57, affirmed 47 A.D. 2d 180, 182) (1975). The Appellate Division held that the receipt by Voice of the letter from the Brooklyn Bar Association prior to the republication was a showing of malice sufficient to preclude summary judgment. Leave to appeal to the Court of Appeals was denied by the Appellate Division. A petition for certiorari to the Appellate Division was denied by this Court (423 U.S. 883). Voice in its petition for certiorari urged that the petitioner's proof of malice was insufficient and that no further proceedings in the State court should ensue and that the judgment was thus final for purpose of review by this Court. Petitioner in his opposing brief argued that the sufficient showing of malice requiring a trial, as held by the Appellate Division, rendered the judgment not final. This Court denied certiorari for want of a final judgment.

In August 1972, when Newfield's articles in Voice and New York Magazine were beginning to be published, Newfield and Marian Wood (Wood), an editor for respondent Holt, Rinehart and Winston (Holt) agreed that the August 31, 1972 and the subsequent articles about petitioner would be republished in a book entitled "Cruel and Unusual Justice" (Appendix DD, A244; Appendix EE, A263). Wood read each of the articles as it appeared in Voice and New York Magazine (Appendix EE, A262).

The book "Cruel and Unusual Justice" was in preparation by Holt over a period of almost two years until its publication on April 15, 1974. During that time Wood and

Newfield were in continual consultation (Appendix FF, A263). In December 1972, Newfield told Wood that he had been interviewed by the Association of the Bar about his New York Magazine article of October 16, 1972 about the petitioner (Appendix EE, A268). Wood knew of rumors that the Association of the Bar had issued its report of that investigation (Appendix EE, A267). Wood read the New York Times article of September 25, 1972 by Nicholas Gage (Appendix EE, A262) in which he reported that in the *Agro* case, the assistant district attorney had stated that Agro was the "least culpable and had no prior record" and that the pleas "in each instance are recommended and the sentence will in all respects be adequate" (Appendix H, A138).

Petitioner's action against Voice was commenced in May 1973. On May 16, 1973 the New York Times published a story about the commencement of that action in which it stated that the "Village Voice articles on which the advertisement was based asserted that Justice Rinaldi had a reputation for going soft on pushers especially when they are represented by certain well-connected bail bondsmen and lawyers. The Voice also said that the judge's judicial temper softens before big heroin dealers and organized crime figures" (Appendix HH, A280). Newfield in May 1973 gave Wood a copy of the Times article about the commencement of petitioner's prior suit which alleged the falsity of the original articles (Appendix DD, A245, 246), and told Wood that she could get in touch with Voice's lawyer, Victor A. Kovner, for any information she wished about the suit (Appendix DD, A246).

Prior to November 1973, Newfield obtained a copy of the Brooklyn Bar Report (Appendiv DD, A249, 250) and wrote a postscript about it for the book, which he then gave to Wood. Wood thus knew, in November 1973, of the Brook-

lyn Bar Report, in her words, "clearing Rinaldi" and inserted in the postscript about it in the book (page 108) a statement of the conclusion in the Report that Newfield's articles were false (Appendix Y, A205). Wood read the New York Times article of April 9, 1974 reporting the conclusion in the Association of the Bar Report that "Newfield failed to substantiate his charges against Justice Rinaldi" (Appendix FF, A273) and she admitted in pre-trial disclosure that Newfield had also then told her that that Report had stated "that he had 'not substantiated' his opinions regarding Justice Rinaldi's alleged incompetence and bias" (Appendix FF, A274). The respondents for months thereafter continued to distribute and promote the book by appearances by Newfield, arranged by Holt, on television and radio (Appendix II, A281-289).

On May 30, 1973, while the book was in preparation for publication, the petitioner was examined in pre-trial disclosure in his prior action against Voice (Appendix BB, A213). During the course of such examination petitioner testified as to the falsity of the articles and petitioner therein produced for inspection by Voice the court minutes in the cases of *Burton, Glover, Vario* and *Agro,* and was examined by Voice's counsel with respect thereto. Petitioner also produced upon such examination the letters from Joseph Vincent Morello (Appendix U, A184) and Leonard D. Wexler (Appendix V, A185). Newfield was also examined in pre-trial disclosure in that action in June and October 1973 while the book was in preparation with respect to the contents of the court minutes in those four cases on which he had based his charges (Appendix CC, A231). On such examination he admitted that if he knew when he wrote the article about *People* v. *Burton* that the district attorney had recommended and consented to Burton's parole on the charge, "if I knew it and withheld that

information it would have been unfair" (Appendix CC, A234).

The petitioner in August 1974 commenced this action based on the defamatory matter in the book concerning him republished from the original articles, with some subsequent additions thereto, which is set forth in paragraph "Twelfth" of the petitioner's complaint (Appendix F, A95).

In its answer and amended answer in this action the respondent Holt admits that during the period from April 1973 through April 1974, it had "knowledge" of petitioner's prior action against Voice and of "plaintiff's sworn testimony in that action" in "reliance" upon which it published the book and based on this, claimed an equitable estoppel against petitioner because he had not sued on the original articles (Appendix G, A110-111).

The respondents moved for summary judgment in this action which was denied at Special Term (Appendix E, A66). The Appellate Division affirmed (Appendix D, A55). The Court of Appeals, on July 14, 1977, reversed and granted summary judgment dismissing the complaint (Appendix A, A1; Appendix C, A5). Petitioner's timely motion in the Court of Appeals for reargument was denied on September 7, 1977 (Appendix B, A3).

The petitioner had joined Voice as a defendant in this action on the ground that it, as copyright owner of the original articles, had given consent to Newfield and Holt to republish them. Special Term dismissed as to Voice (Appendix E, A90-91) and the Appellate Division affirmed (Appendix D, A55). The petitioner did not seek further review of such dismissal as to Voice and that defendant is out of the case.

Although at the time they republished the articles in the book, the respondents were aware that in the four cases, *Burton, Glover, Vario* and *Agro,* the district attorney had consented to and recommended the dispositions, the respondents nevertheless republished the charges in the articles based on those four cases as originally written, that in these dispositions petitioner "had acted suspiciously and in ways that defied law and reason," knowingly and purposefully omitting to state that in each case the district attorney had consented and acquiesced in the disposition. They also added to the charge in the article of August 31, 1972 "So what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit" (Appendix H, A125) by including in the book the sentence "Glover, remember, was not an addict but a businessman," (Appendix FF, A276) though they then knew from the court minutes in *Glover* that Glover was in jail for five years (Appendix L, A155).

Among the charges made in the book is that the petitioner is "probably corrupt" (Appendix F, A100) and that his sentences of heroin dealers and organized crime figures were "suspiciously lenient" (Appendix F, A98). The Court of Appeals agreed that these charges were libelous per se (Appendix C, A20) and that "accusations of criminal activity, even in the form of opinion, are not constitutionally protected" (Appendix C, A27), but held that petitioner had not established their falsity (Appendix C, A28).

Newfield testified in pre-trial disclosure that the charge of "probably corrupt" was "based totally on the fact that he (petitioner) had been indicted" and that he otherwise had no evidence of corruption (Appendix DD, A257).

The indictment of petitioner, subsequently dismissed, was for perjury. Even while the indictment existed, it had no probative force and was enveloped in a presumption of

innocence. It thus could not validly support any charge of probable guilt and the charge of "probably corrupt" based thereon was necessarily false.

The Court of Appeals under what it deemed to be the compulsion of *New York Times* v. *Sullivan, supra*, 376 U.S. 254 and its progeny went beyond this, nevertheless, and held that "it is the plaintiff's burden to establish that he is not 'probably corrupt'" (Appendix C, A28).

As to the charge that "his sentences of certain defendants were "suspiciously lenient" which respondent Newfield admitted on pre-trial disclosure was based on the four cases, *Burton, Glover, Vario* and *Agro* (Appendix CC, A242), the petitioner showed by the court records in each of these cases that these four dispositions were made on the consent and recommendation of the district attorney and that they were not "suspicious" dispositions. The Court of Appeals, nevertheless, again under what it deemed the compulsion of *New York Times* v. *Sullivan, supra,* and its progeny, held that the petitioner has the burden or proving that "no sentences were unduly lenient" (Appendix C, A28).

The Court of Appeals thus placed upon the petitioner the burden of proving the general negative that he is not "probably corrupt" and that "no sentences were unduly lenient," a burden which the concurring opinion of Chief Judge Breitel and Judge Wachtler admitted was "virtually impossible" to meet (Appendix C, A38). The dissenting opinion of Gabrielli, J., stated that the result "is to summarily foreclose the possibility of ever bringing a libel action to the trial stage" (Appendix C, A50).

Reasons for Granting the Writ

The New York Court of Appeals has incorrectly interpreted and applied the decisions of this Court in *New York Times* v. *Sullivan*, 376 U.S. 254 and its progeny and has placed upon a public official plaintiff in a libel action an undue burden of proof which is greater than and not in accord with that laid down by this Court. The Court below has also incorrectly interpreted and applied the decision of this Court in *Miami Herald Publishing Co.* v. *Tornillo* 418 U.S. 241 (1974), in holding that the knowing omission by a publisher of crucial facts showing the falsity of the publication, was a permissible exercise of editorial judgment as to what to publish and thus not evidence of malice. The effect of the decision below is to effectively bar any libel suits by public officials and, as to them, to render the First Amendment privilege of the press virtually absolute.

Since in a libel action by a public official this Court reviews the evidence to make certain that constitutional principles have been correctly applied (*New York Times* v. *Sullivan, supra*), 376 U.S. at p. 285), petitioner deems it necessary to discuss the evidence in detail showing falsity and malice on the part of the respondents.

I.

The holding of the Court of Appeals that petitioner had not met his burden of proof as to the falsity of the publication was erroneous.

Respondent Newfield wrote in the book that petitioner's "judicial temper softens before heroin dealers and organized crime figures" (Appendix F, A95). "During the fall of 1972, I wrote three more articles detailing suspiciously lenient decisions by Justice Rinaldi. Two of these cases

involved Mafia members Paul Vario and Sal Agro, and a third involved a narcotics dealer named Clifton Glover" (Appendix F, A98). "I wrote four articles in the Voice and one in New York Magazine detailing cases in which Judge Rinaldi had acted suspiciously and in ways that defied law and reason" (Appendix F, A100). "What Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit (Glover, remember, was not an addict, but a businessman)" (Appendix F, A98).

The cases which Newfield referred to as having "detailed" were *People* v. *Burton, People* v. *Glover, People* v. *Vario* and *People* v. *Agro.* In his pre-trial disclosure in the prior action of *Rinaldi* v. *Voice,* Newfield testified that his charge that petitioner was suspiciously lenient to heroin dealers and organized crime figures "was based on my previous writing about the *Burton, Glover, Vario* and *Agro* cases primarily" (Appendix CC, A242) and that when he wrote such statement he had no other specific cases in mind (Appendix CC, A242-243).

Whether such charge of "suspicious leniency," based on those four cases, is true or false is best and conclusively determined from the Court records in those cases. The petitioner on his pre-trial disclosure in the prior action of *Rinaldi* v. *Voice,* and in this action, produced the court minutes in those four cases.

The court minutes in *People* v. *Burton* (Appendix J, A141) show that Burton had been released by another judge on bail of $3000 on a drug charge. When he was arraigned before petitioner on a related bribery charge, the assistant district attorney stated that "in view of the fact that he is on bail on two other charges and this bribery charge emanates from those two others, we will have him

available, I would recommend parole."* Petitioner, accordingly, paroled the defendant on the bribery charge. There is, thus, no basis for the charge that this was "suspicious." All that was before petitioner was a routine bail arraignment, not the disposition of the indictment, on which he accepted the recommendation of the district attorney as to bail.

In *People* v. *Glover,* the court minutes (Appendix L, A149) show that Glover had just received a five year federal sentence on a robbery conviction and that petitioner postponed Glover's case until the time to appeal from the federal sentence had expired. Then, with the acquiescence of the district attorney, to dispose of the case, he accepted a guilty felony plea from Glover with no imposition of any additional time in jail, since Glover would be in federal jail for the next five years. Petitioner imposed the sentence on Glover of a conditional discharge and Glover was then taken from the courtroom in the custody of federal marshals to serve that five year sentence (Appendix L, A155, Appendix DD, A252). The assistant district attorney acquiesced in the sentence (Appendix M, A159).

Under New York Penal Law Section 65.05, a conditional discharge was not permissible in a narcotics case. The reason for this is stated in the Commentary under McKinney's Statutes, Penal Law, Section 65.05, as follows:

> "The sentence of conditional discharge provides the court with an appropriate disposition where it wishes to impose specific obligations upon the offender but where probation supervision is unnecessary or inappropriate.
>
> • • •

* The assistant district attorney stated in an affidavit that this was his practice as to bail in related cases (Appendix K, A148).

> The sentence of conditional discharge cannot be used . . . as a sentence for any felony dealing with narcotics. In these cases the sentence must be either probation or imprisonment.
>
> • • •
>
> The purpose of the aforesaid restrictions is to assure some sort of supervision of persons who commit such crimes irrespective of the circumstances involved."

The restriction against conditional discharge, requiring supervision of the defendant, did not envision the unusual circumstances in *Glover*. A sentence of probation for purpose of supervision, which petitioner had discretion to impose, was inappropriate, as petitioner stated (Appendix L, A155-156), because Glover would be under supervision in a federal jail. Petitioner could have given Glover a sentence concurrent with the federal sentence, but under the circumstances, a conditional discharge, though not permissible in a narcotics case, was the most practical one. The district attorney evidently agreed. An article in the New York Times dated November 15, 1973, reported that the State Select Committee on Crime was investigating 247 unauthorized conditional discharges imposed by a number of Supreme Court justices, one of which was stated to be the *Glover* sentence by petitioner. The article states that "Eugene Gold, the District Attorney of Brooklyn, said through a spokesman that in every instance where we become aware of an illegal sentence, we move to correct it." He never moved to correct the *Glover* sentence. The nub of respondents' charge that, by his sentence of Glover, petitioner was putting him on the street to sell death for a profit was shown to be false. There is thus no basis for respondents' charge that petitioner's sentence of Glover was "suspiciously lenient."

In *People* v. *Vario,* the court minutes (Appendix N, A160) show that the case involving Salvatore Vario, James Marinacci and Benjamin Greenfeder came on before petitioner four years after a conviction on a prior three months' trial before another judge had been reversed because of illegal wiretaps which were suppressed by the Appellate Division. The district attorney stated on the record that because of the suppressed evidence and the fact that the case was four years old, he had grave doubt that he could get a conviction and for this reason he recommended the acceptance of a misdemeanor plea from the defendants (Appdendix N, A161-162). Petitioner then accepted such pleas. Salvatore Vario, who had spent over a year in jail pending appeal, received a suspended sentence. Greenfeder and Marinacci were sentenced to a fine of $500 or six months in jail. As to Paul Vario, he was not in the indictment with the others. He was indicted for attempting to bribe an investigator to obtain his brother Salvatore's release on bail, pending appeal, which was a legal impossibility because Salvatore was prohibited appeal bail by statute since he had a previous felony conviction (Appendix O, A169; New York Code of Criminal Procedure Sections 552, 555 (in effect in 1967); *People* v. *Stolzenberg* (N.Y.) 40 Misc.2d 177 (1963)). As to Paul Vario, the district attorney stated that his case also depended on suppressed wiretaps, (Appendix N, A164) and he recommended a misdemeanor plea as to him also on which he was sentenced to a fine of $250 or three months in jail. In view of the district attorney's recommendation of a misdemeanor plea because of the weakness of his case, the record does not support respondents' charge that the misdemeanor plea and sentence was "suspiciously lenient," and that "Judge Rinaldi caused a local scandal when he permitted three prominent organized crime figures charged with bribery and conspiracy to plead guilty to

misdemeanors and let them go free with only $250 fines" (Appendix F, A95-96).

In *People* v. *Agro,* the court minutes (Appendix P, A172) show there was a large number of defendants, who, except for Agro, wished to plead guilty. Agro insisted he was innocent and would not plead. The district attorney did not wish to try the case only as to Agro (Appendix BB, A226). He stated that Agro was the least culpable and had no prior record and that if Agro would plead to a misdemeanor, he, the district attorney, would recommend a suspended sentence (Appendix R, A180, 181). Agro agreed to take the plea if the judge would promise him the suspended sentence. On the district attorney's recommendation, the petitioner made the promise and later on sentence date kept it as he was then required to do under *Santobello* v. *New York,* 404 U.S. 257, 262 (1971). Since the plea and sentence were as recommended by the district attorney, the *Agro* case in no way supports respondents' charge of "suspicious leniency."

The Brooklyn Bar Association made an examination of the court records in these cases on which Newfield based his charge of "suspicious leniency to heroin dealers and organized crime figures" and made in a Report of such investigation (Appendix Y, A195) its conclusion that the magazine and newspaper articles are "untrue, misleading, inaccurate, a misrepresentation and contrary to the true facts" (Appendix Y, A198).

The Association of the Bar of the City of New York also investigated and obtained copies of the court minutes in these cases (Appendix X, A192) and interviewed Newfield about them (Appendix X, A190, Appendix DD, A251). It concluded in its Report that "Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts" (Appendix X, A194).

The petitioner thus made a clear and convincing showing that the charge of "suspicious leniency" admitted by respondents to be based on these four specific cases was false. The Court below held nevertheless, under what it deemed the compulsion of *New York Times* v. *Sullivan,* and its progeny that petitioner must establish the impossible negative that "no sentences were suspiciously lenient." To establish this, the petitioner would have to resurrect all of the dispositions made over many years on the bench and then litigate with the respondents the facts in each case to show that each disposition was not "suspicious." If he should, perchance, omit any case, the respondents would claim it was an intentional omission in order to conceal it. Aside from the fact that this would prolong this libel case for years, the practical impossibility of it is apparent. It is, in any event, irrelevant to this case where the respondents admittedly based their charge on petitioner's dispositions in the four specific cases and this is all the petitioner should be required to establish as false.

The charge that petitioner is "probably corrupt" was not in the orginal articles but was added in the book after the petitioner was indicted for perjury on November 12, 1973. With respect to the original articles Newfield had testified on pre-trial disclosure in the prior case of *Rinaldi* v. *Voice* that "In none of those cases do I allege corruption or venality", "I have no evidence of corruption" (Appendix CC, A241). In his pr-trial disclosure in this case he testified that his charge of "probably corrupt" was "based totally" on the indictment and that he otherwise had no evidence of corruption (Appendix DD, A257).

The petitioner had been indicted on three counts of perjury and one count of obstruction of justice which is based on the three alleged perjuries (Appendix JJ, A290). The first two counts in the indictment were dismissed on

motion (*People* v. *Rinaldi,* 44 A.D. 2d 745 affd. 34 N.Y. 2d 843) (1974). As to the third and fourth counts, the trial judge (Murtagh) made a statement on the record in the absence of the jury, press and public, that there was no case and that he should dismiss it, but that since a judge was involved, he thought there should be a jury verdict but that "in the unlikely event" there should be a guilty verdict, he would set it aside. The jury acquitted.

An indictment is no longer in existence after acquittal or dismissal (*People* v. *Louis J.* dissenting opinion 51 A.D. 2d 1, 15 on which reversed in 40 N.Y. 2d 990, 992 (1976) cert. den. —— U.S. —— 52 L. Ed. 2d 397).

Even when the indictment existed it was of no probative force (*People* v. *Cook,* 37 N.Y. 2d 591, 596 (1975). An indicted defendant is presumed to be innocent and the trial court must so charge the jury (New York Criminal Procedure Law Section 300.10). Therefore, a charge in an indictment cannot in any way be said to be true from the fact of the indictment itself.

The grand jury indicted petitioner for perjury, not corruption. The preamble to the indictment alleges that the grand jury was investigating in *People* v. *Gomes,* whether petitioner had been criminally influenced to impose a lenient sentence and in *People* v. *McCauley* whether the petitioner had been part of a scheme to unlawfully reduce McCauley's sentence on the basis of a forged document submitted to the Court (Appendix JJ, A290, 295). But this is purely rhetoric by a special prosecutor, Maurice Nadjari, since thoroughly discredited (See, for example, *Matter of Nigrone,* 46 A.D. 2d 343 (1974); *People* v. *Rao,* 53 A.D. 2d 904 (1976). In the *Gomes* case, the minutes showed that in accepting the guilty plea, petitioner told the defendants that in sentencing, he would be guided by the probation report. The probation report recommended probation and no jail sentence. Petitioner told the defendants that although he had said he would be guided by the probation report, he was surprised by it and would not follow it. He sentenced the defendants to jail terms. Nadjari suppressed the *Gomes* minutes before the grand jury.

In the *McCauley* case, the minutes showed that upon McCauley's claim that he was wrongfully sentenced as a third felony offender, he submitted a federal certificate which showed him to be a second felony offender. The district attorney stated that he did not have his copy, it was missing, of the certificate submitted when McCauley was originally sentenced which showed McCauley to be a third felony offender. Petitioner told the assistant district attorney to go over, during recess, to the Federal Court nearby, to check it out. He came back and told petitioner that McCauley's certificate was correct and petitioner resentenced McCauley as a second felony offender. The certificate later turned out, after McCauley's death in jail, to be a forgery. The *McCauley* minutes were likewise suppressed by Nadjari before the grand jury.

The petitioner waived immunity and testified before the grand jury. He also answered a detailed financial questionnaire and gave the special prosecutor and the grand jury all the bank and financial records of himself and his wife for the past three years. The special prosecutor did not ask petitioner a single question before the grand jury whether he was bribed or corruptly influenced in either the *Gomes* or *McCauley* case or of any alleged contact with the defendants in those cases or their attorneys or anyone else on their behalf as to any illicit influence or bribery. Instead, the special prosecutor confined himself to questions of the petitioner which he thought might lay the basis for the perjury charges.

In *People* v. *Brust* (New York Law Journal December 2, 1976 (pages 12-13) Sandler, J. in dismissing an indictment against a judge for perjury, which was presented to the grand jury by the same assistant special prosecutor as in the *Rinaldi* case,* stated:

> "Nor can one realistically exclude the possibility that the prosecutor was encouraged to form the opinion that the defendant was lying by his awareness that the underlying facts could not support an indictment for bribery.
>
> "Having formed that conclusion he diverted the questioning from efforts to learn the truth of the matters under investigation into a careful systematic effort to develop and preserve perjury counts.
>
> • • •
>
> "I can think of no reason for not asking that question other than the obvious one, reflected throughout the examination, that the prosecutor was interested in a perjury indictment, not in developing accurate information."

The Court of Appeals agreed that the charges made by the respondents in this case are libelous per se (Appendix C, A20) and that they are charges of "illegal and unethical actions: and that "accusations against a judge of criminal activity, even in the form of opinion are not constitutionally

* In the *Rinaldi* case Nadjari himself appeared before the grand jury, recalling the two witnesses as to the *McCauley* case who had on his assistant's interrogation not testified sufficiently to show perjury and pressured them on their testimony by leading questions. Nadjari had in his possession the *McCauley* minutes suppressed by him before the grand jury which showed a direct contradiction between one witness' statement in that case and his testimony before the grand jury. Nadjari did not ask any questions of the witness before the grand jury as to his patent perjury. This apparently was the pressure applied to the witness before recalling him before the grand jury.

protected" (Appendix C, A27). Yet, although the respondents admitted that the charge of "suspiciously lenient" was based on petitioner's dispositions in four specific cases and the petitioner had demonstrated the falsity of such charge by the strongest possible proof, the court records in those four cases, and although the respondents admit that the charge of "probably corrupt" is "based totally" on the indictment and though a charge that an indicted person is "probably guilty," from the fact of the indictment, is false, the Court of Appeals nevertheless held that it is petitioner's burden to establish the general negative that he is not "probably corrupt" and that "no sentences were unduly lenient" (Appendix C, A28).

The Court of Appeals stated that the acquittal on the indictment "involved dispositions other than the ones in issue in this case" and that Newfield's overall accusations have not been rebutted by anything more than a general denial of wrongdoing. Hence there are no evidentiary facts which would support plaintiff's claim that Newfield's accusations are false" (Appendix C, A28, 29). This holding is made in the face of respondents' admission that their charge of "probably corrupt" was based solely on the indictment involving those "other dispositions" and that the dispositions "in issue in this case" were in the four specific cases on which the respondents based their charge of "suspicious leniency" which charge was established by petitioner, from the court records in those four cases, to be false.

What the Court of Appeals is requiring of a public official in a libel case is that he must bear the impossible burden of establishing the general negative of a charge of criminal misconduct. The Court of Appeals construes this Court's decisions in *New York Times* v. *Sullivan* and its progeny to so require. If the Court of Appeals' interpreta-

tion and application of this Court's decisions is correct, then the press has a virtually absolute immunity against libel actions by public officials.

Though the Court below agrees (Appendix C, A20) that the charge of criminality is libelous *per se* (*Paul* v. *Davis*, 424 U.S. 693, 697 (1976); *Thomas H. Maloney & Sons, Inc.* v. *E.W. Scripps Company* (1974) 43 Ohio App. 2d 105, 334 N.E. 2d 494, 499 (1974) cert. den. 423 U.S. 883; *Goldwater* v. *Ginzburg* (2 Cir.) 414 F. 2d 324 (1969) cert. den. 396 U.S. 1049; *Davis* v. *Schuchat* (D.C. Cir.) 510 F. 2d 731, 737, 738 (1975); *Afro American Pub. Co.* v. *Jaffe* (D.C. Cir.) 366 F. 2d 649, 655 (1965); *Phoenix Newspapers Inc.* v. *Church* 24 Ariz. App. 287, 537 P. 2d 1345 (1975) cert. den. 425 U.S. 908), and that "no First Amendment protection enfolds false charges of criminal behavior" (Appendix C, A28), (*Gregory* v. *McDonnell Douglas Co.* 131 Cal. Rep. 64, 552 P. 2d 425, 430) (1976), the Court of Appeals, nevertheless, holds that the publisher is not required to offer any basis for his libelous *per se* criminal charges, but that the public official must prove the negative of their falsity. (Cf. *Time Inc.* v. *Firestone*, 424 U.S. 448, 459 (1976) where the burden of proof as to the correctness of its interpretation of a court record was put on the publisher.)

Under the decision of the Court of Appeals in this case, a newspaper, without any support therefor, could freely publish of a public office holder that he is a sex pervert or a rapist. The burden, impossible of being met, is then on the public official, in a libel action, to establish, beyond a general denial which the Court of Appeals holds to be insufficient (Appendix C, A28-29), that he, in his lifetime, committed no acts of sex perversion or rape. The publisher, being not required to show any support for the defamation, is then entitled to a dismissal of the com-

plaint on the basis of plaintiff's obvious inability to prove a negative. The result is deemed by the Court of Appeals to be compelled by the decisions of this Court in *New York Times* v. *Sullivan* and its progeny. Such interpretation and application of this Court's decisions is plainly wrong.

Heretofore, when a person has been indicted, no newspaper has dared to go so far as to publish that he is probably guilty. The decision of the Court of Appeals in this case now permits the press to so publish with impunity and we can be sure that, freed from past restraints, the news media will now do so with relish and abandon. The result will be that few indicted defendants will be able to get a fair trial.

II.

The holding of the Court of Appeals that petitioner had not shown clear and convincing evidence of malice on the part of the respondents sufficient to defeat summary judgment was erroneous.

A.

In his pre-trial disclosure in the prior action of *Rinaldi* v. *Voice*, the respondent Newfield testified that prior to his writing the original articles in 1972, the *Glover* sentence had been mentioned at a hearing by the Joint Legislative Committee on Crime (Appendix CC, A239) and that he had read a Daily News article and editorial (Appendices Z and AA, A207, 211) which mentioned petitioner's name, and nothing more, but which was based on the mention of the *Glover* case by the Committee (Appendix CC, A239). Newfield's information, prior to writing the original articles as to the *Burton* bail hearing, came from the police officer (Appendix F, A99, Appendix H, A121). His information

as to the *Vario* and *Agro* cases came from the Gage article in the New York Times of September 25, 1972 (Appendix CC, A235). (In that article Gage had stated that in *Agro*, the plea and sentence were on the recommendation of the district attorney (Appendix H, A138-139). Thus, Newfield even then became aware of this (Appendix CC, A236) but omitted it from the article and from its republication in the book (Appendix CC, A237-238).

Newfield wrote in the book that when Patrolman David in 1972 told him of the *Burton* case (Appendix DD, A254), "I spent the next several weeks carefully analyzing records of Judge Rinaldi's previous dispositions." He then continued by stating what this "careful analysis" purported to disclose (Appendix F, A99). On pre-trial disclosure this alleged "careful analysis of records of petitioner's previous dispositions" was exposed as a fraud. There was no such several weeks analysis and he did not check the court file in a single case (Appendix DD, A254, 257). But since this statement in the book concludes with the statement that, as a result of such analysis, "I wrote four articles in the Voice and one in New York Magazine detailing cases in which Judge Rinaldi had acted suspiciously and in ways that defied law and and reason," (Appendix F, A100) it is clear that this purported "analysis of the records" preceded the writing of the original articles about *Burton, Glover, Vario* and *Agro* and referred to those cases and he did not write about any other cases after that.

In his pre-trial disclosure in the prior action of *Rinaldi* v. *Voice,* Newfield testified that his charges against petitioner in the original articles were also based on interviews with lawyers and law enforcement agencies. But he refused to divulge their names, based on New York Civil Rights Law Section 79h, which provides that "no professional journalist . . . employed or associated with any newspaper

. . . shall be adjudged in contempt by any court . . . for refusing or failing to disclose any news or the source of any such news coming into his possession in the course of gathering or obtaining news for publication . . ." A motion was made to preclude the defendant Voice in that action from offering evidence on the trial as to such undisclosed sources. The Court, on that motion, held that Newfield should disclose such sources if the defendant intended to offer them on the trial. On re-examination, pursuant to such direction, Newfield testified that two of his sources were Assistant District Attorney Charles J. Hynes and Jerome McKenna, Counsel to the Joint Legislative Committee on Crime. When asked if Hynes had given him any specific cases, Newfield said Hynes had not (Appendix DD, A257). When asked what McKenna had told him about any cases which he said were in the Committee file, Newfield answered "I don't remember" (Appendix DD, A258). As to the other claimed sources, Newfield persisted in his refusal to divulge. An order was then made by the Court precluding the defendant from introducing any evidence or using any witnesses in any way relating to the refused to disclose sources. In this action, after similar refusal to testify as to such sources for the original articles, a similar order of preclusion was made.

The claim of alleged sources is one of defense on the issue of malice. Petitioner, in his pre-trial disclosure, sought to discover information as to any such possible defense in his preparation for trial. Petitioner was not required to and had no intention, in his affirmative case, of introducing any evidence as to any of Newfield's claimed sources, but only in rebuttal if any such evidence was offered by Newfield. Petitioner stated on his motion to preclude that he believed that Newfield was inventing such sources and was covering this up by invoking Civil Rights Law, Section 79h. Witness Newfield's exposed fraud in his claim of having spent

several weeks carefully analyzing records of petitioner's dispositions (Appendix DD, A254-257) and his admitted failure to look at the court files in the four specific cases he wrote about in the same courthouse in which he claimed to have interviewed lawyers.

Since reliance on sources is a matter of defense, the defendants had the choice of producing such evidence or assuming the risk, on claim of confidentiality, of not offering it, and thus taking the consequences of such choice of forgoing such defense. Obviously, Newfield could not have it both ways and on the trial testify that he had anonymous sources and then refuse to answer any questions on cross-examination as to them. The protection afforded Newfield, against contempt, was purely a statutory one. Refusal to name sources is not a constitutional privilege (*Brandenburg* v. *Hayes,* 408 U.S. 665 (1972); *Farr* v. *Pitchess,* 522 F. 2d 464 (1975) cert. den. 427 U.S. 912; *Rosata* v. *Superior Court of California,* 51 Cal. App. 3rd 190, 124 Cal. Reptr. 427 (1975) cert. den. 427 U.S. 912). Even a constitutional privilege is waived by the giving of any testimony at the trial as to the privileged matter (*Brown* v. *United States,* 356 U.S. 148, 155-156 (1958); *Rogers* v. *United States,* 340 U.S. 367, 373 (1951); *United States* v. *Nobles,* 422 U.S. 225, 240, 242 (1975); *Brown* v. *Walker,* 161 U.S. 591, 597 (1896); *McGauthen* v. *California,* 402 U.S. 183, 215 (1971).

The foregoing alleged second hand sources about the *Burton, Glover, Vario* and *Agro* cases which Newfield claimed to have relied on in writing his original articles, became irrelevant and ineffectual when, in the petitioner's prior action the respondents became aware of what actually happened from their reading of the court minutes in those four cases made a part of petitioner's disclosure in that prior action.

Petitioner's claim of malice on the part of the respondents in this case is based on such admitted so acquired knowledge on their part of the contents of such court minutes and their knowledge of the reports of the Association of the Bar (Appendix X, A189) and the Brooklyn Bar Association (Appendix Y, A195) finding the falsity of the articles republished in the book and the Morello and Wexler letters (Appendices U, V, A184, 185) and the interview of Newfield by the Association of the Bar on December 28, 1972 (Appendix X, A190) and the New York Times article on May 16, 1973 (Appendix HH, A279), all of which advised the respondents that their intended republication would be a false publication and that the second-hand information purported to have been relied on by Newfield in writing the original articles could no longer be relied on to support the charges against petitioner made in the original articles when they were republished in the book.

The book "Cruel and Unusual Justice" was in preparation by Holt over a period of almost two years. The articles repeated in the book had already been published and were not "hot news" and there was no urgency about republication (*Curtis Publishing Co.* v. *Butts,* 388 U.S. 134, 155 (1967); *Goldwater* v. *Ginzburg,* 414 F.2d 324, 339 (1969) *cert. den.,* 396 U.S. 1049; *Carson* v. *Allied News Co.,* 529 F.2d 206, 211 (1976); *Church of Scientology* v. *Dell Publishing Co.,* 362 F.Supp. 767, 769, (footnote 1) (1973). Holt's editor Wood was in constant consultation with Newfield during this period about the contents of the book (Appendix FF, A263). This included the period from May 1973 when petitioner commenced his prior suit, which was pending all during that period to April 15, 1974 when the book was published. Wood knew that the petitioner's prior suit involved the falsity of the identical articles which were to be republished in the book, and she thus obviously had the

greatest interest in what was shown in that prior lawsuit about the falsity of these articles.

In his pre-trial disclosure on May 30, 1973 in the prior action of *Rinaldi* v. *Voice*, at which respondent Newfield was present, petitioner produced the court minutes in the four cases of *Burton, Glover, Vario* and *Agro* and petitioner was examined by Voice with respect thereto (Appendix BB, A213). In the course of that examination, petitioner demonstrated to Voice and Newfield the falsity of their published charges against petitioner based on those cases. In addition, on said examination, petitioner produced copies of the letters from Morello (Appendix U, A184); and Wexler (Appendix V, A185) to New York Magazine pointing out the falsity of what Newfield had written about the *Burton* and *Vario* cases.

In his pre-trial disclosure examinations in the prior action in June and October 1973 and in this action (Appendix DD, A247-248) Newfield admitted that he had read the court minutes in those four cases produced by petitioner and the Morello, Wexler and Brooklyn Bar Association letters and he admitted in disclosure in the prior action that if he knew when he wrote the original article about *People* v. *Burton* that the district attorney had recommended Burton's release without additional bail, he would have put that in the story "in plain fairness" and that "if I knew it and withheld that information, it would have been unfair" (Appendix CC, A234). Despite this admission, he failed to include it in the book in which the article was thereafter republished as originally written. Newfield also admitted that his omissions were not due to any space restrictions imposed on him (Appendix CC, A238).

Newfield admitted that he had, prior to the republication of the articles in the book, obtained a copy of the Brooklyn

Bar Association Report (Appendix DD, A249-250) pointing out the inaccuracies in his articles based on the *Burton, Glover* and *Vario* cases (Appendix Y, A197-205). Newfield also admitted that on December 28, 1972 he had been interviewed about his article based on those cases by the Association of the Bar and that when the substance of its Report was published in the New York Times on April 9, 1974, he obtained a copy of its Report (Appendix DD, A250, 251).

In the original article of August 31, 1972 about the *Burton* and *Glover* cases, Newfield wrote (Appendix H, A125):

> "So what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit."

Prior to the republication of this article in the book, Newfield knew from his reading of the court minutes in *Glover* that Glover was in a federal jail for five years and had not been put on the street, and he so admitted (Appendix DD, A252). Yet he deliberately had Wood add to the article in the book after the above-quote from the original article, the sentence "Glover, remember, was not an addict but a businessman (Appendix FF, A276). On his pre-trial disclosure in this action he blandly testified that he meant Burton, that he could not have been referring to Glover because he knew Glover was going to the Federal penitentiary (Appendix DD, A252-253). Respondent Holt, from its knowledge of the Court minutes in *Glover* which it had obtained from petitioner's disclosure in the prior action, also knew this inclusion as to Glover to be false.

The respondent Holt in its answer and amended answer admitted under oath that it knew of petitioner's prior action in April 1973, when it was commenced and also of

"plaintiff's sworn testimony in that action" upon "reliance" on which it published the book (Appendix G, A110-111). The petitioner's complaint in that prior action annexed copies of the advertisement which repeated statements from the original articles and the original articles themselves, which are alleged in that complaint to be false (Appendix H, A115).

The respondent Holt's so admitted knowledge of petitioner's pre-trial disclosure testimony in the prior action necessarily included, besides knowledge of his testimony as to falsity, knowledge of the contents of the Court minutes in the four cases produced by petitioner on such examination, as well as the letters from Morello and Wexler (Appendices U, V, A184, 185) which plainly brought home to Holt the knowledge that the charge of "suspicious leniency" to heroin dealers and organized crime figures based on those four cases was false.

A sworn admission in a pleading is the strongest kind of evidence (*Tisdale* v. *Delaware & Hudson Canal Co.*, 116 N.Y. 416, 419 (1889); *Kelly* v. *St. Michaels Roman Catholic Church* (N.Y.), 148 App. Div. 767, 771 (1912); *Hall* v. *United States* (D.C. Cal.), 314 F. Supp. 1135 (1970); Wigmore on Evidence (Chadbourne Rev. 1972) Section 1064 (2); 31A Corpus Jur. Second, Evidence, Section 301).

Also, Newfield testified on pre-trial disclosure that he gave Wood a copy of the article in the New York Times of May 16, 1973 (Appendix DD, A245-246) about the commencement of petitioner's prior action against Voice, which states (Appendix HH, A280):

> "The Village Voice articles on which the advertisement was based asserted that Justice Rinaldi had a 'reputation for going soft on pushers especially when they are represented by certain well-connected bondsmen and lawyers."

> "The Voice also said that the judge's 'judicial temper softens before big heroin dealers and organized crime figures.'"

Newfield testified on pre-trial disclosure that at the time he gave Wood a copy of the Times article of May 16, 1973, he gave Wood the telephone number of Voice's attorney in that action and told her to get in touch with him for information about that suit (Appendix DD, A245). Wood admitted this, (Appendix FF, A272) but said she never did so.

Wood, in her pre-trial disclosure, admitted that prior to the publication of the book she was aware that there was a Brooklyn Bar Association Report (Appendix EE, A266) in her own words "clearing Rinaldi" (Appendix EE, A267) and that she in November 1973 received from Newfield the postscript which is published in the book (p. 108) stating that the Brooklyn Bar Association attacked Newfield's articles as "malicious, unfounded and irresponsible." But she claimed that despite this, she never asked Newfield to let her read his copy of the Report.

Wood admitted that she read the New York Times article of April 9, 1974 reporting that the Association of the Bar Report stated that Newfield had "not substantiated" his charges against Judge Rinaldi (Appendix FF, A273) and that when Newfield obtained a copy of that Report on that day (Appendix DD, A250), he told her "that the Report had stated that he had not substantiated his opinions regarding Justice Rinaldi's incompetence and bias" (Appendix FF, A274).

Wood admitted that she read Gage's Times article of September 25, 1972 (Appendix EE, A262) which stated as to *Agro* that the assistant district attorney had stated that Agro was the least culpable and had no prior record and

recommended the plea and sentence (Appendix H, A138-139). She then read Newfield's article of October 12, 1972, admitted by Newfield to be based on Gage's Times articles (Appendix EE, A262), in which Newfield stated that "Agro pleaded guilty and was given a suspended by Judge Rinaldi" and omitted, what he knew from the Gage article, that the assistant district attorney had recommended the plea and sentence. Yet, in editing the book, Wood left unchanged therein the statement by Newfield (Appendix F, A98):

> "During the fall of 1972, I wrote three more articles detailing suspiciously lenient decisions of Justice Rinaldi. Two of these cases involved Mafia members Paul Vario and Sol Agro and a third involved a narcotics dealer named Clifton Glover."

It is plain from the foregoing that respondent Holt had clear notice of the falsity of its publication about the petitioner and made no further effort to investigate. This Court has held that failure to further investigate after notice of falsity constitutes a reckless disregard for truth or falsity sufficient to constitute malice (*Curtis Publishing Co.*, v. *Butts, supra,* 388 U.S. 130, opinion of Harlan, J. page 162, footnote 23; opinion of Chief Justice Warren pages 169-170, opinion of Brennan, J. page 172; *Church of Scientology* v. *Dell Publishing Co.* (D.C.Cal) 362 F. Supp. 767, 769-770) (1973); *Alioto* v. *Cowles Communications, Inc.* (N.D. Cal.) 430 F. Supp. 1363, 1371 (1977).

B.

Newfield testified as to the manuscript "We went over it and if she (Wood) had any questions I would have to convince her that it was right. She was a professional editor." (Appendix D, A246-247). In editing the August

31, 1972 Voice article for inclusion in the book, Wood saw the heading in large type, "Justice Gets A Fix" (Appendix H, A120) which gives the anticipation and impression to the reader that the article would report venality or corruption on the part of the petitioner. An experienced editor would necessarily say to the author, "Now, wait a minute you don't show any 'fix' in the article," (as Newfield had admitted, Appendix CC, A241) and any responsible editor would then say "the heading must go, we know it is a false heading." Wood, however, knowingly repeated the false and defamatory heading in the book (Appendix I, A140). This constitutes malice (*Sprouse* v. *Clay Communications Inc.* (Sup. Ct. of App. W. Va. 1975) 211 S.E. 2d 674, 686 *cert. den.* 423 U.S. 882; *Carson* v. *Allied News Co., supra* (7 Cir.) 529 F. 2d 206, 212 (1976); *Lawyers Co-Op Publishing Co.* v. *West Publishing Co.* (N.Y.) 32 App. Div. 585, 590 (1898); *Vocational Guidance Manuals* v. *United Newspaper Manuals Inc.,* 280 App. Div. 593, 595 affd. 305 N.Y. 380 (1953); *Rathkopf* v. *Walker* (N.Y.) 190 Misc. 168 (1947); *Campbell* v. *New York Post,* 245 N.Y. 320, 328 (1927).

C.

For the respondents to have charged that "petitioner is suspiciously lenient to heroin dealers and organized crime figures" and "acted suspiciously in ways that defied law and reason" and "is putting people on the street who sell death for a profit," claiming to have based such charges on their claimed information about petitioner's dispositions in four specific cases, though actually knowing from the court records in those four cases, that the charges are false, is clear and convincing evidence of malice on their part" (*Hotchner* v. *Doubleday & Company Inc.* (2 Cir.) 551 F. 2d 910, 913) (1977).

If respondents had published, as they knew to be the fact, that in each of those cases the dispositions were made on the recommendation of the district attorney, for the reasons appearing on the record, such published charge would have been self-destructive and probably never would have been published. Yet the Court below stated that this "omission of relatively minor details in an otherwise basically accurate account is not actionable. This is largely a matter of editorial judgment in which the courts and juries have no proper function (*James* v. *Gannett*, 40 N.Y. 2d 415, 424, *supra*). To paraphrase Chief Justice Burger's statement in *Miami Herald Publishing Co.* v. *Tornillo* (418 U.S. 241, 258), the choice of material to go into a book and the decisions made as to limitations in size and content, and treatment of public issues and public officials, whether fair or unfair, constitute the exercise of editorial judgment" (Appendix C, A31).

In *Miami Herald supra*, this Court held a Florida right of reply statute to be unconstitutional since a newspaper as a matter of free press could not be required to print answers to its articles. It was not a libel case. This Court, it is submitted, has not held and did not intend to hold that a defamatory charge of criminality based on a knowing omission of vital facts which demonstrate the falsity of the charge was such a permissible exercise of editorial judgment as to what to print so as to bar any libel action. Such knowing omission of crucial facts is clearly evidence of malice (*Montandon* v. *Triangle Publications Inc.*, 45 Cal. App. 3rd 938, 944, 120 Cal. Rep. 186, 189 (1975), cert. den. 423 U.S. 893; *Varnish* v. *Best Medium Publishing Co.* (2 Cir.) 405 F. 2d 608, 611, 612, 613 (1968) cert. den. 394 U.S. 987; *Goldwater* v. *Ginzburg, supra* (2 Cir.) 414 F. 2d 324, 336, 337 (1969) cert. den. 396 U.S. 1049).

The statement of the Court below that the omissions here are of "relatively minor details" is clearly erroneous. The

author-emanated odor of "suspicious dispositions" evaporates in the context of the district attorney's consent and recommendation of those dispositions.

This is like saying that a publication about a married woman that she was naked in a room with a man not her husband, knowingly omitting to state that the man was a doctor giving her a physical examination, was not a libelous charge of adulterous conduct because the published statement was literally true and that the knowing omission was merely a relatively minor detail.

The omission of the facts in each of the four supporting cases cited by Newfield showing that the district attorney consented to or recommended the disposition is what renders clearly false the charge based on those four cases that the respondent "acted suspiciously in ways that defied law and reason" when heroin dealers and organized crime figures were involved (Appendix F, A99-100).

The Association of the Bar in investigating Newfield's charge that petitioner's "judicial temper softens remarkably before heroin dealers and organized crime figures" stated "as to this charge he gives three cases as examples." The Association of the Bar then examined the court minutes in these cases and, based on the facts which it found Newfield to have omitted, its Report concluded that "Mr. Newfield failed to substantiate his charges against Justice Rinaldi and omitted several material facts" (Appendix X, A194).

The Brooklyn Bar Association made a similar investigation of this charge and examined the court minutes in these cases and based on Newfield's omission of the material facts as to the consent and recommendation by the district attorney in each case, came to the same conclusion that "the author's treatment of Judge Rinaldi is calculated to create

an impression that is not borne out by the facts. The untruths, half-truths and misrepresentations concern the very heart of the accusations against Mr. Justice Rinaldi" (Appendix Y, A199).

The opinion of Justice Gellinoff denying the motion for summary judgment, on which opinion the Appellate Division affirmed, likewise stated the omitted facts to be crucial (Appendix E, A80-82).

D.

The charge that petitioner is "probably corrupt" "based totally" on his indictment for perjury is a knowingly false statement. All members of the press and publishing world know that in the face of the constitutional presumption of innocence and the lack of probative force of an indictment, it is false to say that an indicted defendant is guilty and for this reason they have never done so, since this would be a malicious defamation for which they would be liable (*Paul* v. *Davis, supra,* 424 U.S. 693, 697 (1976); concurring opinion of White, J. in *Greenbelt Co-Op Publishing Association* v. *Bressler,* 398 U.S. 6 at pages 21-22 (1970); *Patterson* v. *New York,* —— U.S. ——, 53 L. Ed. 2d 281, 292 (1977); *Gregory* v. *McDonnell Douglas Co., supra,* 131 Cal. Rep. 641, 552 P. 2d 425, 435) (1976). Here, besides, the respondents knew that the indictment was for perjury and that the grand jury found no indictment for corruption.

All that the respondents, stretching their statements to the limit of what they thought they could get away with, said of the indictment in the book was (pp. 104-105):

> "On November 12, 1973, Judge Rinaldi was indicted on three counts of perjury by a grand jury impanelled by Special Prosecutor Maurice Nadjari. He was also indicted on one count of obstruction of justice. The perjury involved criminal cases Judge Rinaldi was suspected of fixing. If convicted on all counts Judge Rinaldi could be sentenced to 22 years in prison."

Nevertheless, the respondents made the general statement in another context (Appendix F, A100) that petitioner is "probably corrupt." On pre-trial disclosure, knowing that the respondents had no other possible support for this charge, Newfield testified that it was "based totally on the indictment" (Appendix DD, A257). Since the mere fact of the indictment is no support for a charge of probable criminal conduct, the respondents are without any defense for their malicious charge of "probably corrupt."

E.

With respect to the other charges in the book that petitioner is "very tough on long-haired attorneys and black defendants especially on questions of bail, probation and sentencing (Appendix F, A95) and that "every law enforcement agency in the state is aware of Judge Dominic Rinaldi's reputation for going easy on members of the Mafia. The Joint Legislative Committee on Crime has a whole file full of suspicious dispositions by Judge Rinaldi in organized crime cases" (Appendix F, A102), "he has a reputation among lawyers and court reformers for going soft on pushers, especially when represented by certain well-connected bondsmen and lawyers (Appendix F, A96), "he is cruel or abusive to defendants (Appendix F, A102), "defendants connected with organized crime families were treated permissively," "occasionally large-scale heroin dealers would get inexplicably lenient sentences," "and certain Brooklyn lawyers would almost always win their cases before Rinaldi" (Appendix F, A99-100), the respondents have set forth nothing on their motions for summary judgment to support these statements. (As to the charge that

petitioner was repressive toward black defendants, Newfield admitted on pre-trial disclosure in the prior action of *Rinaldi* v. *Voice* that when he wrote it he had no specific cases in mind (Appendix CC, A241, 242).

As to his claimed careful analysis, prior to writing the original articles, of records of petitioner's previous dispositions (Appendix F, A99) this, as previously noted, turned out on pre-trial disclosure to be a fraud. The Joint Legislative Committee on Crime had made a statistical study of dispositions by all judges of what it called organized crime defendants. Its study consisted merely of the names of the defendants and the dispositions (Appendix DD, A255; Appendix H, A136). No facts in any case were stated. Newfield testified he went to the office of the Committee and there on two sheets copied down the names and dispositions of some of the defendants in three of petitioner's cases (Appendix DD, A258). On their motion for summary judgment, the respondents offered nothing in support of their charge that the "Joint Legislative Committee on Crime has a whole file full of suspicious dispositions by Rinaldi in organized crime cases" (Appendix F, A102). They did not even present or rely on these dispositions in those three cases. This was plainly because the court records in those three cases show that they were similar to the four cases of *Burton, Glover, Vario* and *Agro* and that such dispositions were made with the concurrence of the district attorney and were in no way "suspicious." Petitioner was prepared to produce the court records in those three cases, but since respondents did not rely on these cases, and did not even refer to them, it was deemed by petitioner unnecessary to do so. Respondents having made these charges should have been required to show that the court records support their version (*Time Inc.* v. *Firestone, supra,* 424 U.S. 448, 459) or any other claimed supporting evidence.

Since the respondents have offered no supporting basis for these charges, it must be presumed that they were made with reckless disregard for their truth or falsity (*Hartley* v. *Conrad and Times Mirror Co.* (Court of Appeals of California, Second Appellate District, Division Three, February 3, 1976 unreported cert. den. for nonfinality of judgment —— U.S. —— 50 L. Ed. 2d 152; *Guam Federation of Teachers* v. *Ysrael* (9 Cir.) 492 F. 2d 438, 439 (1974) cert. den. 419 U.S. 872; *Carson* v. *Allied News Co., supra* (7 Cir.) 529 F. 2d 206, 213 (1976).

In *Hartley* v. *Conrad and Times Mirror Company, supra,* the Court held in denying summary judgment:

> "While respondents made a strong showing of the basis for their charge that appellant's refusal to allocate the shortfall caused a bleak Southern California Christmas, negating reckless disregard of the truth or knowledge of falsity in that respect, they made no effort to demonstrate that there was any basis for a charge that appellant was in any way responsible for causing the diversion order."

F.

In dismissing petitioner's suit on a motion for summary judgment, without a trial, the Court below, though agreeing that the award of summary judgment in libel actions is governed by the same rules as in civil actions generally (Appendix C, A32), acted contrary to the fundamental concept of summary judgment as issue finding and not issue deciding in which the existence of an issue of fact requires denial of the motion (*Stone* v. *Goodson,* 8 N.Y.2d 8, 12-13 (1960); *Phillips* v. *Kantor,* 31 N.Y.2d 307, 311 (1972); *Sillman* v. *Twentieth Century Fox Corporation,* 3 N.Y.2d 395, 404 (1957). "The *standard* against which the evidence must be examined is that of *New York Times* and its progeny. But the *manner* in which the evidence is to be ex-

amined in the light of that standard is the same as in all other cases in which it is claimed that a case should not go to the jury" (Emphasis by the Court.) (*Guam Federation of Teachers* v. *Ysrael, supra,* 492 F.2d 438, 439, *cert. den.,* 419 U.S. 872; *Church of Scientology* v. *Dell Publishing Co., supra,* 362 F. Supp. 767, 770; *Thomas H. Maloney & Sons Inc.* v. *E. W. Scripps Co., supra,* 43 Ohio App.2d 105, 334 N.E. 494, 499; *cert. denied,* 423 U.S. 883; *Phoenix Newspapers* v. *Church, supra,* 24 Ariz. App. 287, 537 P.2d 1345, 1356, *cert. denied,* 425 U.S. 908, 985; *Rancho La Costa Inc.* v. *Penthouse International Ltd.* (Superior Ct. Cal. April 5, 1976, unreported, cert. den. —— U.S. —— 53 L.Ed.2d 245).

In this case, for example, the respondent Holt on its motion for summary judgment has chosen to claim that its sworn admission in its answer, that since April 1973 it knew of petitioner's prior action and of petitioner's pre-trial disclosure testimony in that action (Appendix G, A110-111), was false and that it did not have such knowledge.

Petitioner's pre-trial disclosure in the prior action took place while the book republishing the articles was in preparation. It is hardly plausible that the respondent Holt would not, as it admitted it did, obtain a copy thereof. It made this admission in its answer because it thought it could base an estoppel thereon. Having abandoned such defense as untenable it seeks to deny what it admitted. If that respondent's sworn admission in its answer is not conclusive against it and it is open to it to say that it lied in that answer, at the very least this in itself, creates a factual issue as to malice which requires a trial and thus a denial of summary judgment (*Talbot* v. *Laubheim,* 188 N.Y. 421, 424 (1907); *Krauss* v. *Birnbaum,* 200 N.Y. 130, 137 (1910); *Brisbane* v. *City of New York,* 8 A.D.2d 882, 883 (1958)).

Also, though Wood admitted in her pre-trial disclosure that she had pre-publication knowledge of the Brooklyn Bar Association Report, as she said, "clearing Rinaldi" (Appendix EE, A267), she says in her reply affidavit on Holt's motion for summary judgment that she did not choose to accept it and thus that such knowledge of the Report's conclusions cannot be imputed to her (Appendix GG, A278). Such knowledge that the Report "cleared" petitioner of the charges made by Newfield in the articles republished in the book, and failure on her part to further investigate, is, at the very least, evidence of reckless disregard for the truth or falsity of the charges which requires determination by the jury as a factual issue. (*Curtis Publishing Co.* v. *Butts, supra; Alioto* v. *Cowles Communications Inc., supra; Church of Scientology* v. *Dell Publishing Co., supra*).

Also, Wood admitted that Newfield told her of his interview by the Association of the Bar on December 28, 1972 about his charges in his article of October 16, 1972 against petitioner (Appendix EE, A268). This was during the period when the book republishing the articles, was in preparation and Wood obviously had to be keenly interested in any investigation of the charges in the articles. When asked on pre-trial disclosure what Newfield had told her about the interview, she took refuge in "I don't remember" (Appendix EE, A268-269). She also admitted that during that period she had discussed with Newfield rumors that the Association of the Bar had made its Report of the results of such investigation (Appendix EE, A267-268), which she was aware, from Newfield's interview by the Committee, would be expected to be unfavorable to Newfield's charges against petitioner.

With respect to the Association of the Bar Report, Wood in her moving affidavit admitted that "I recall reading the

New York Times and Daily News articles (of April 9, 1974) which I recall reported that he (Newfield) had not substantiated his charges against Justice Rinaldi" (Appendix FF, A273). When her original affidavit was made, Wood thought this to be a safe admission, since she coupled it with the statement that copies of the book, whose publication date was April 15, 1974, had been released for sale some weeks before (Appendix FF, A274). However, when the petitioner's opposing affidavit demonstrated that for months thereafter, with knowledge of the Times article and the Association of the Bar Report, Holt continued to sell and promote the book (Appendix II, A281-289), Wood had no compunction, in her reply affidavit, against swearing that she never saw the Times article until after this lawsuit was commenced in August 1974 (Appendix GG, A277). Wood, however, unfortunately for her on this factual issue, which she now created, overlooked the fact that she had also stated in her moving affidavit that "After the City Bar Report had been disclosed and he obtained a copy of it, the author told me that the Report . . . had stated . . . that he had not 'substantiated' his opinions regarding Justice Rinaldi's alleged incompetence and bias" (Appendix FF, A273). Newfield obtained a copy of the Report when it was made public on April 9, 1974 (Appendix DD, A250) and Wood thus then knew of its import, even if she had not, as she had admitted, read the Times article of April 9, 1974.

Also, Wood in her reply affidavit (Appendix GG, A277) states that she never saw the New York Times article of May 16, 1973, reporting that the advertisement sued on was based on the falsity of the statements repeated therein from the original articles republished in the book. Since this would be evidence of knowledge by Wood that in the prior action petitioner claimed the original articles republished in the book to be false, it does not matter to

Wood that she contradicts the testimony, not of the petitioner, but of the respondent Newfield that "I informed her (Wood) when the suit was filed. I believe in May, I showed her the article in the New York Times" . . . "I know I gave her the Times article and told her of the situation, and gave her Victor's phone number if she had any further questions she should confer with Victor" . . . "The only thing I gave Holt was the New York Times clipping about the filing of the suit" (Appendix DD, A245-246).

Petitioner has offered evidence which clearly and convincingly establishes knowledge by the respondents of the falsity of their publication and thus at the very least, that this was a case where "the writer must be aware of the probability that the statement might be false, and knowing that . . . takes a calculated risk and publishes it anyway" (*Varnish* v. *Best Medium Publishing Co., supra*, 405 F.2d 608, 612 *cert. denied*, 394 U.S. 987) and that it was therefore "circulated with reckless disregard for its truth or falsity" (*Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 490 (1975) and that "the finder of fact must determine whether the publication was indeed made in good faith" (*St. Amant* v. *Thompson*, 390 U.S. 727, 732 (1968); *Davis* v. *Schuchat* (D.C. Cir.) 510 F.2d 731, 735 (1975); *Phoenix Newspaper Inc.* v. *Church, supra*, 24 Ariz. App. 287, 537 P.2d 1315, 1355, *cert. denied*, 421 U.S. 908; *Goldwater* v. *Ginzburg, supra*, 414 F.2d 324, 337).

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,
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